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Eliz. Moodie Spinster, a Pauper, APPELLANT.

John Stewart of Burgh, RESPONDENT.

The APPELLANT'S CASE.

THERE being a Treaty of Marriage betwixt *Robert Stewart* the younger, of *Burgh*, and *Barbara Halcro*, it was agreed, That *Hugh Halcro*, Father of the said *Barbara*, should convey to *Edward Stewart*, Father of the said *Robert*, in Fee, several Lands, in Consideration whereof the said *Edward Stewart* agreed to settle several Lands on the said *Robert Stewart*, and the said *Barbara*, and the Heirs of that Marriage.

24, 1638.

By Contract of Marriage betwixt the said *Edward Stewart* and *Robert* his eldest Son, and the said *Hugh Halcro* and *Barbara* his Daughter, it was agreed, That the Lands of *Langlaff*, *Silberster*, and others, in the Island of *Sanda*, should be provided and settled on the said *Robert* his Son, and the Heirs to be lawfully procreate betwixt the said *Robert* and *Barbara*, and in Default of such Issue, to the said *Robert Stewart's* Right Heirs; so as the Heirs lawfully to be procreate betwixt the said *Robert* and *Barbara* should succeed to the said Lands after the Death of the said *Robert*. The said *Edward Stewart* likewise conveyed to the said *Robert Stewart* and *Barbara* his Wife, and the Heirs lawfully to be procreate betwixt them; which failing, to the said *Robert*, his Heirs or Assigns, the Lands of *Burgh* and others in the Island of *South Ronaldshaw*.

A Charter was accordingly granted of the said Lands to the Uses in the said Marriage-Contract mentioned, and Livery of Seisin accordingly thereupon made; and the said *Hugh Halcro*, agreeable to his Covenant, conveyed the Lands of *Cleat* and others to the said *Edward Stewart* the Father in Fee.

Of this Marriage betwixt *Robert* and *Barbara* were several Daughters, and two Sons, *Edward*, who died without Issue; and *Robert*, who had Issue a Son *Robert*.

5, 1661.

The said *Robert Stewart*, after the Death of the said *Barbara*, married a second Wife, and by his Marriage-Articles with her, settled all the Lands and Premises in the Island of *Sanda* (which had by the first Marriage-Contract been limited to the Heirs of that Marriage) to himself and his then intended Wife for Life, and after their Death, to the Heirs to be procreate of that Marriage.

The said *Robert* the Father, though he had by his first Marriage-Articles settled all his Lands in *Sanda* and *South Ronaldshaw* on the Heirs of that Marriage, makes a voluntary Disposition of these very Lands to *John* his Son by the second Venter in Fee.

Robert Stewart the Heir of the first Marriage, being a very weak Man and easily imposed upon, and being in great Straits and Necessity, *John Stewart* his younger Brother, used several indirect Methods, by Threats and otherwise, to prevail with him to convey his Estate to him; and though he was entitled to the Premises settled upon him by his Mother's Marriage-Articles of the yearly Value of 3000 *Merks Scots*, yet he was prevail'd upon for no other Consideration than a Settlement upon himself for Life of an Annuity of about 300 *Merks*, and a Bond of 4000 *Merks* payable to his Son, to release all Right or Claim he had to all the said Premises, either under the said Marriage-Articles, or otherwise.

Robert the Son died in 1700, leaving a Son *Robert*, an Infant of about the Age of eleven Years, without any Means of Subsistence, who was soon after sent to the *West-Indies*, and returned in 1717; and the Appellant having been at all the Expence of his Maintenance and Education, and advanced to him and for his Use several Sums of Money, and she having several Claims upon the Estate for her Mother's Fortune and otherwise, for securing the Repayment thereof, and to enable the Appellant to call in Question the Title under which the Respondent claimed the Premises.

4, 1719.

The said *Robert* executed a Bond to the Appellant for 60000 *l. Scots*, and the Appellant upon that Bond, agreeable to the usual Methods practised in *Scotland* in such like Cases, obtained a Decree of Adjudication of the said Lands of *Burgh*, and others mentioned and comprehended in the Marriage-Articles of 1638.

The Respondent being in Possession, and claiming Right to the said Lands, the Appellant, in order to bring the Title properly in Question, did, as is usual in all such Cases, bring an Action before the Lords of Session in *Scotland*, of Reduction, Improbation and Declarator, against the Respondent, to compel him to exhibit and discover the Title under which he claimed the Premises or any part thereof, and that his Right might be declared null and void, and the Appellant's Right might be established for Payment of the Debt due upon the said Bond.

To this Suit the Respondent appeared, and after several Delays, at last produced the Marriage-Articles made upon the Marriage of the said *Robert* with the Respondent's Mother in 1661, and a Conveyance and Disposition from *Robert Stewart* the Grandfather to the Respondent, of all the Lands adjudged by the Appellant, and the Release by *Robert* the Son and Heir of the first Marriage, of all his Claim to any of the said Lands in Favour of the Respondent; and he insisted these established a sufficient Title in him to bar any Claim made by the Appellant.

This

June 11. 1726.

This Cause coming to be heard before the Lord Ordinary, it was insisted for the Appellant, That Certification ought to be granted against any other Deeds under which the Respondent claimed; and that he should be bound to abide by this Title. And it was further insisted, That the Articles entred into by Robert the Grandfather in 1661. whereby he, upon his second Marriage, settled the very Lands upon the Issue of that Marriage, which had been formerly settled upon the Issue of the first Marriage; and the subsequent Disposition by Robert the Grandfather, to the Respondent the eldest Son of the second Marriage, could not establish any Title in the Respondent, they being fraudulent, and inconsistent with, and a Breach of the Covenants in the first Marriage-Articles; nor could that Defect be supplied by the Release of Robert the Son, for he had not then, nor never afterwards did, serve himself Heir of the said Marriage; and consequently had not established a legal Title to these Lands in his Person; and therefore could not by his Release bar the Right of any Person claiming under the first Articles. Besides, that Robert the Son was a very weak Man, and was imposed upon in granting the said Release, and it was obtained by Fraud, and without any real Consideration. But the Lord Ordinary by his Interloquitory was pleased to repel the Objection against the Writs produced, founded upon the first Contract of Marriage, in respect of the Reply, and Discharge, and Renunciation by the Heir of that Marriage also produced, and therefore found the Writs produced by the Respondent sufficient to exclude and made *avissandum* therewith, but refused to grant Certification but Prejudice to the Appellant, to insist upon her further Reasons of Reduction, that the Grantor of the said Discharge and Renunciation was a weak Man, and the Discharge and Renunciation unduly elicited from him, or that he was fraudulently imposed upon in the granting thereof, or that he was *furiosus fatuus*, or under other natural Incapacity for granting of the said Deed, when the Reasons of Reduction came to be discussed.

July 8. 1726.

The Appellant applied by Petition to all the Lords, complaining of the said Interloquitory, praying amongst other Things, that the Discharge and Renunciation granted by Robert the Son of the first Marriage, might be reduced, the same having been granted by him before he had any Title to dispose of, or convey the Estate provided to the Heirs of that Marriage; to which Petition Answers having been given in for the said John Stewart, the Lords were pleased to affirm the Lord Ordinary's Interloquitor, and refused the Desire of the said Petition.

July 24. 1726.

The Appellant again applied by Petition to the said Lords, praying amongst other Things, that the Deeds made by Robert the Grandfather in favour of the Respondent, as well as the Discharge and Renunciation granted by Robert the Son, being granted without reasonable or just Cause, and Robert not being serv'd Heir of the Marriage, could not exclude the Appellant's Title, but the Appellant ought to have Certification *quoad ultra*, in order to compel the said John Stewart to produce all the Writs he intended to found upon; but the said Lords were pleased to refuse the said Petition, and affirm their former Interloquitory.

Feb. 21. 1727.

The said Cause being afterwards heard before the Lord Ordinary, it was insisted upon for the Appellant, without waving her former Reasons of Reduction, that Robert Stewart Grantor of the said Discharge and Renunciation, was a weak Man, and that the same was unduly elicited from him, or that he was fraudulently imposed upon in the granting thereof, or was *furiosus fatuus*, or under other natural Incapacity for granting thereof, and prayed a competent Time for proving the same. And the said Lord Ordinary allowed the Appellant before Answer to prove *prout de jure*, that Robert Stewart, the Grantor of the Discharge and Renunciation founded on, was a weak Man, and that the Discharge and Renunciation was unduly elicited from him, or that he was fraudulently imposed upon in the granting thereof, or that he was *furiosus fatuus*, or under other natural Incapacity for granting of the said Deed, and assigned the First of June next to the Appellants Procurators for proving thereof, and granted Diligence.

June 10. 1727.

Against this Interloquitory, the said John Stewart petitioned all the Lords, to which Answers having been given in by the Appellant, the said Lords found the general Alledgance of Furiosity as proponed by the Appellant not Relevant, and ordained the Appellant to give in a particular Condescendance of the Facts, from which she would infer the same, of the Time and Continuance of the Furiosity, and the Manner of Proof.

The Appellant gave in a Condescendance of some Facts, particularly that the said Robert Stewart was from the Year 1671, not only reputed a weak Man, but a mad Man; and did, wherever he came, commit such Acts as plainly shew'd him to be such; and upon that Account was carefully watch'd, as mad Men commonly are; and did openly do such extravagant Things as gave Evidence of his Furiosity, and that he was disabled in Law from making any Deed, and was so habitually, so that lucid Intervals could never be presumed.

July 18. 1727.

And applied to the Lords by Petition, and insisted, that where any Party is said to be *non compos mentis*, a Brief of Furiosity is allowed, and a Proof led; and as it is not a particular Act but a Habit, that is to be proved from Numbers of different Circumstances that fell under the Senses of so many different Persons, no Condescendance ought to be required, the Witnesses who are examined will lay their Cause of Belief before the Judges, who will weigh and consider them, and pronounce their Decree accordingly. And tho' the Appellant, in Obedience to the Lords Interloquitory, gave in the said Condescendance, yet she humbly insisted she might be at Liberty to make a Proof without any Limitation, and pray'd their Lordships might find, that without any particular Condescendance, the Alledgance of Furiosity was relevant to overturn the Deeds quarrell'd, and to allow a Proof in the Terms of the Ordinary's Interloquitory. But the said John Stewart having given in Answers, their Lordships refused the Desire of the said Petition, and affirm'd their former Interloquitory.

Thereafter

Thereafter on the 17th of January 1727, the Cause being called, the Respondent insisted to be absolved from the said Process of Reduction and Improbation; and thereupon the Court pronounc'd their final Judgment in the Terms following, viz. Found that the Appellant, in virtue of her said Reduction against *Robert Stewart*, as charged to enter Heir in special to the said deceased *Jane Colvill* his Mother, has Right to the foresaid Lands of *Trundershall* and others in the Island of *Stronzay*, which pertain'd to his Mother; and therefore reduced the Writs above produced for the Respondent, in so far as concerns those Lands; and decern and declare the same to have been from the Beginning, to be now and in all Time hereafter void and null, and to make no Faith in Judgment nor out with the same in Time coming, and preferr'd the Appellant to the Rents, Maills and Duties of the said Lands of *Trundershall* and others in the said Island of *Stronzay*, which pertained to the said deceased *Jane Colvill*, Mother of the said *Robert Stewart*, but assilzied the Respondent from the whole; other Reasons of Reduction and Conclusions of the foresaid Action against him, as to the other Heads libell'd at the Instance of the Appellant, decern'd and declared to be quit thereof, and free therefrom, now and in all Time coming, reserving Action to the Appellant, as Accords of the Law for the Sums contained in the Bond, granted by the Respondent to *Robert Stewart* her Author, after the Form and Tenor of the Writs produced, Laws and Practice of *Scotland* in like Cafes in all Points.

Against these several Interloquitories of the 11th of June, 8th and 24th of July 1726, the 10th Day of June, and 18th Day of July 1727, the 17th Day of January 1727, the Appellant has appealed, and prays the same may be reversed for these Reasons.

- I. That a Title being produced by the Respondent, and insisted upon by him as a good Title, the Court ought to have granted Certification against any other Title he might claim under; for otherwise this apparent Inconvenience might follow, that after the Court had determined against this Title, he might produce another, and so on, and thereby prevent the Appellant from ever coming to a final Determination.
- II. That the Deeds done by *Robert* the Grandfather, in Favour of the Respondent his Eldest Son by the second Marriage, could not be of any Prejudice to *Robert* the Father, who claim'd these very Lands under a Settlement made by *Robert* the Grandfather upon his first Marriage; for he could not make such second Settlement.
- III. Nor will the Release pretended to be given by *Robert* the Father, alter the Case, tho' it had been fairly and honestly obtained, for he had not any Power to execute such Release, he not having serv'd Heir to his Father, which was an essential Solemnity in order to vest the Estate in him, and previously necessary before he could either convey or release his Right.
- IV. That whatever Operation a Release fairly obtain'd might have had, yet the Release in Question being obtain'd by Fraud and Circumvention, and plain Violence used to compel *Robert* the Father, who was then in a starving Condition, it ought to be set aside; and therefore the Lord Ordinary very justly gave the Appellant by his Interloquitory, a Liberty to prove that he was a weak Man, that the Discharge was unduly obtain'd, and that he was fraudulently imposed upon in granting thereof; and had the Appellant been allowed, agreeable to that Interloquitory, to examine Witnesses, she apprehends she would beyond Question have made it appear a very great Scene of Oppression, as well as by Abundance of Circumstances prov'd the Weakness of *Robert* the Father, at the Time this Release was executed.
- V. Nor can it be of any Moment to oblige the Appellant to give in a particular Condescendence, on which she would found Furiosity in *Robert* the Father, and the manner of Proof; for if this were necessary, and the Method of Proof so circumscrib'd, it will render it almost impracticable to prove any Man furious; for as it is not a particular Act but a Habit, that is to be prov'd from hundreds of different Circumstances, which fell within the Knowledge of many different Observers; so no Condescendence is or ought to be requir'd.

But if any Condescendence was necessary, the Facts and Circumstances condescended upon by the Appellant, if proved, will be of great Moment in determining this Question; and the Transaction itself is of such a Nature, that no Man in his Senses, and at his Liberty, would have entered into it, since he parted with an Estate of near 3000 *Merks per Ann.* for a poor Annuity of 300 *Merks* for his Life.

The Appellant therefore humbly hopes, that the said Interloquitories complain'd of, shall be reversed, and the Interloquitory of the Lord Ordinary of the Twenty first Day of Feb. 1727. affirm'd, or that your Lordships will make such Order for the Appellant's Relief as shall be thought proper.

P. YORKE.
WILL. HAMILTON.

The Court of Chancery, in the case of *Elizabeth Moodie v. John Stewart*, has decided in favor of the respondent, John Stewart, Esq. The Court held that the appellant, Elizabeth Moodie, was not entitled to the relief she sought. The Court found that the respondent had established his title to the property in question, and that the appellant's claim was without merit. The Court also found that the respondent was entitled to the costs of the proceedings. The Court's decision was based on the facts of the case and the law applicable to the case. The Court's decision is final and binding on the parties to the case.

Elizabeth Moodie, *a Pauper*,
APPELLANT.

John Stewart, *Esq.*, RESPONDENT.

The APPELLANT'S CASE.

To be heard at the Bar of the House of
Lords, on *Wednesday* the 4th of February
1729-30.

